Supreme Court, U.S.
FILED
MAY 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-1603

CATHERINE A. DAUGHERTY,

Petitioner,

vs.

CITY OF LONG BEACH, CALIF.,
a municipal corporation, and
STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

JERROLD A. FADEM
MICHAEL M. BERGER
of FADEM, BERGER & NORTON
A Professional Corporation

501 Santa Monica Boulevard
Suite 600
P. O. Box 2148
Santa Monica, CA 90406
(213) 451-9951

Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. _____

CATHERINE A. DAUGHERTY,

Petitioner,

vs.

CITY OF LONG BEACH, CALIF.,
a municipal corporation, and
STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

JERROLD A. FADEM
MICHAEL M. BERGER
of FADEM, BERGER & NORTON
A Professional Corporation

501 Santa Monica Boulevard
Suite 600
P. O. Box 2148
Santa Monica, CA 90406
(213) 451-9951

Attorneys for Petitioner

TOPICAL INDEX

	Page
Table of Authorities	
Opinion Below	4
Jurisdiction	5
Questions Presented For Review	5
Constitutional Provisions	7
STATEMENT OF THE CASE	8
VESTED PROPERTY RIGHTS CANNOT - CONSISTENT WITH DUE PROCESS OF LAW - BE SWEPT ASIDE BY SUDDEN CHANGES IN THE LAW THAT (IN THE WORDS OF THE TRIAL JUDGE) "TOOK THE WHOLE [LEGAL] PROFESSION [BY SURPRISE]"	12
GION-DIETZ, BY RADICALLY AND RETROACTIVELY CHANGING THE LAW OF "IMPLIED DEDICATION", UNCONSTITUTIONALLY IMPARIED THE OBLIGATION OF CONTRACTS, IN CONFLICT WITH DECISIONS OF THIS COURT	22

TABLE OF AUTHORITIES

	Page
CONCLUSION	25
APPENDIX A - OPINION Court of of Appeal, Dated Dec. 16, 1977	
APPENDIX B - PETITION FOR REHEARING DENIED, Dated JAN 3- 1978	
APPENDIX C - ORDER, HEARING DENIED, Dated FEB 9 1978	
APPENDIX D - NOTICE OF INTENDED DECISION, Dated 8/1/74	
APPENDIX E - JUDGMENT QUIETING TITLE TO REAL PROPERTY, Dated, 1/13/75	

TABLE OF AUTHORITIES

Cases

	Page
Chicago, B. & Q. R. Co. v. Chicago (1897) 166 U.S. 266	12
City of San Diego v. Hall (1919) 180 Cal. 165	20
Gion v. City of Santa Cruz (1970) 2 Cal.3d 29, 84 Cal.Rptr. 162 465 P.2d 50	Passim
F.A. Hihn Co. v. City of Santa Cruz (1915) 170 Cal. 436	19, 20
Hughes v. Washington (1967) 389 U.S. 290	12, 13, 16, 20
Manhattan Beach v. Cortelyou (1938) 10 Cal.2d 653	20
Muhlker v. New York & Harlem R.R. (1905) 197 U.S. 544	12, 24, 25
Sotomura v. Co. of Hawaii (D.H (D. Hawaii 1975) 402 F.Supp. 95	15. 16

	Page
Stovall v. Denno (1967) 388 U.S. 293	21
Whiteman v. City of San Diego (1920) 184 Cal. 163	20

Statute

28 U.S.C. § 1257(3)	5

Constitution

United States Constitution	
Article 1, §10	6, 7, 11, 23
Fifth Amendment	7, 11
Fourteenth Amendment	7, 11

Texts

The Supreme Court of California 1969-1970 (1971) 59 Calif. L. Rev. 30, 231-232	18
This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches (1971) 44 S. Cal. L. Rev. 1092, 1093	18, 20

	Page
Public or Private Ownership of Beaches: An Alternative to Implied Dedication (1971) 18 U.C.L.A. L. Rev. 795, 802	18
Lascher, Tips For the Overburdened Reader (1971) 46 Cal. St. B. J. 13, 16	17
Shavelson, Gion v. City of Santa Cruz: Where Do We Go From Here? (1972) 47 Cal. St. B. J. 415	17

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. _____

CATHERINE A. DAUGHTERY,

Petitioner,

vs.

CITY OF LONG BEACH, CALIF.,
a municipal corporation, and
STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

Petitioner Catherine A. Daugherty respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, Second Appellate District, Division Four, in the case at bench and, upon such review, the decision be reversed.

This case represents a particularly cruel illustration of the problem which can accompany the use of extreme "solutions"

to problems perceived as "environmental" in nature.

One can endorse the general public goal of preservation of coastal resources and provision of public access to the shore. Such agreement, however, does not lead to approval of the means chosen by the California courts to accomplish it.

Confiscation of Mrs. Daugherty's property based on events which occurred decades ago, and under legal rules which gave no warning of the confiscation which would occur decades later, is the product of this case's movement towards that goal. Uncounted others occupy the same unfortunate situation.

The general solution devised by the California Supreme Court in its decision in Gion v. City of Santa Cruz (1970) 2 Cal.3d 29, 84 Cal.Rptr. 162, 465 P.2d 50,[1/] was a radical and unexpected expansion of the doctrine of "implied dedication" based upon a series of fictional presumptions.

1/ The Gion case was consolidated with Dietz v. King and is sometimes referred to as the Gion-Dietz decision.

The Court presumed that long use of property by "the public" meant that the owner knew of the use being made and acquiesced in it (2 Cal.3d at 38, 84 Cal.Rptr. at 167, 465 P.2d at 55). It further presumed that "public use" for five years meant that the use was adverse (2 Cal.3d at 39, 84 Cal.Rptr. at 168, 465 P.2d at 56).[2/] And it further presumed that this presumably adverse use in which the owner presumably acquiesced meant that the owner presumably intended to dedicate his property to "the public" (2 Cal.3d at 38-39, 84 Cal.Rptr. at 167-168, 465 P.2d at 55-56).

The California Supreme Court impliedly presumed that there are no "nice guys" who would allow members of "the public" to use their vacant property, and expressly refused to recognize that a general license to "the public" would or could knowingly be granted (2 Cal.3d at 41, 84 Cal.Rptr. at 169, 465 P.2d at 57).

2/ It is a bit troublesome to reconcile the conclusions that five years of "use by the public" is presumptive proof of simultaneous acquiescence and adversity.

After five years of such use, the property is dedicated to "the public".

Based on testimony of "public use" half-a-century ago (before Mrs. Daugherty's home was built), the trial court ordered a "public recreation easement" impressed on her entire property - including her home.[3/] To the "nice guys" in the world, confiscation is their reward. The only California beach owners who escaped Gion-Ditez are the misanthropes who fenced "the public" out.

Opinion Below

The opinion of the California Court of Appeal presented for review by this petition is reported as City of Long Beach v. Daugherty (1977) 75 Cal.App.3d 972, _____ Cal.Rptr.____. A copy of the opinion is attached as Appendix A.

3/ On appeal, the City and State requested that the easement be relinquished as to the home itself, and the Court of Appeal did so.

Jurisdiction

The judgment of the California Court of Appeal was filed and entered December 16, 1977. A timely Petition for Rehearing was denied by that Court January 3, 1978. A copy of the order is attached as Appendix B. A timely Petition for Hearing in the California Supreme Court was denied February 9, 1978. A copy of the order is attached as Appendix C. A copy of the Superior Court's Notice of Intended Decision is attached as Appendix D, and its Judgment as Appendix E.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

Questions Presented For Review

1. When a state Supreme Court reverses a long-standing rule of property which sets up the requirements for establishing the prescriptive dedication of private property to public use, and then the courts of that state retroactively apply the new rule in such a manner that property which was private under the old rule, ipso facto, eo instanti, becomes public

under the new rule - without the payment of any compensation to the former owner, and without any opportunity for private property owners to adjust their actions to fulfill the requirements of the new rule - has the former owner been deprived of property without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Can a state, without violating the Fifth and Fourteenth Amendments to the United States Constitution, take private property for public use without compensation, by means of a sudden change in judicially declared property law?

3. Does it violate the contract clause of the United States Constitution (Article 1, §10), for a state supreme court to radically alter property rights and then retroactively apply its new decision to property acquired and protected pursuant to previously-settled law?

4. Is a litigant afforded due process of law when a state court establishes presumptions about the effect of human behavior - which have no basis in fact - which are applied so conclusively that once evidence of that behavior has been introduced, the opponent can do nothing to rebut its impact?

Constitutional Provisions

The following Constitutional provisions are involved in this petition:

U.S. Const., Art. 1, §10, Cl. 1:

"No State shall . . . pass any . . . law impairing the obligation of contracts . . ."

U. S. Const., 5th Amentment:

". . . nor shall private property be taken for public use, without just compensation."

U.S. Const., 14th Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Since 1922 there has been a home on the 25 foot wide lot now owned by Petitioner Catherine Daugherty. Mrs. Daugherty's tiny lot is located near the easterly end of an eight and half mile long ocean beach in Long Beach, California.

Before 1922, some members of the general public had used part of the eight and a half mile beach for recreation. There was no testimony that anyone used Mrs. Daugherty's 25 foot portion of that eight and a half miles. Mrs. Daugherty's home was constructed in 1922. The home covers approximately 95 feet of the lot's 155 foot depth. The remainder of Mrs. Daugherty's lot, what would normally be called one's front yard, had no fence separating it from the seaward public

beach (just as most people do not fence their front yards).

Before 1922 (indeed, before 1970's Gion-Dietz decision), the law of California was clear from a series of California Supreme Court decisions beginning in 1915 that the fact that the owner of undeveloped beach property failed to object to "public" use was presumed to show that a license had been granted for such use. This licensed use would not result in the prescriptive acquisition or "implied dedication" of the property to the public.

Then in 1970, the California Supreme Court stunned the legal community[4/] with its decision in Gion v. City of Santa Cruz [consolidated with Dietz v. King] (1970) 2 Cal.3d 29. Gion-Dietz turned the law around. Under the new Gion-Dietz rule, five years of "public" use no longer resulted in a presumption of a license, but instead of an intent to dedicate the

---

4/ Commentators referred to it as a "bombshell", and likened its impact on real property law to both an "earthquake" and a "hurricane." (See text accompanying notes 6-7, infra.)

land to the "public."

If Gion-Dietz were applied prospectively only, property owners would have time to adjust their actions to the new rule.

But in the case at bench, the California courts retroactively applied Gion-Dietz. They held that the innocent pre-1922 acts, which were presumed to have been performed under a license from the owner (and thus could not result in the "public's" prescriptive acquisition of rights), were now to be judged by the post-1970 law, which presumes the contrary. The trial court, referring to the Gion-Dietz rule as having been given ". . . judicial birth . . . after an unduly long and substantially unknown and uneventful pregnancy . . . ," remarked:

> "Here we are concerned that a Gion recreational easement was established in the public prior to 1922. By the same token, before the Gion decision was announced recently (1970), no one knew it existed." (Notice of Intended Decision, Appendix D., pp. 8,5.)

The result is that Mrs. Daugherty's property has been taken from her for public use without any compensation, by a sudden and unexpected change in state property law, in violation of Article 1, §10 and the Fifth and Fourteenth Amendments to the United States Constitution. These U.S. Constitutional issues were raised by Mrs. Daugherty in each level of the California Court system. They appear in her Answer to the Complaint and her Cross-Complaint, as well as her Motion for New Trial in the Superior Court, the Appellants' Opening Brief and Petition for Rehearing in the Court of Appeal, and the Petition for Hearing in the Supreme Court. Each court has closed its eyes to these unconstitutional incursions.

VESTED PROPERTY RIGHTS CANNOT - CONSISTENT WITH DUE PROCESS OF LAW - BE SWEPT ASIDE BY SUDDEN CHANGES IN THE LAW THAT (IN THE WORDS OF THE TRIAL JUDGE) "TOOK THE WHOLE [LEGAL] PROFESSION [BY SURPRISE]"

This Court has consistently held that the 14th Amendment prohibits state courts from establishing or changing rules of law relating to vested property rights in such a way that the rights are taken for public use without just compensation. (Muhlker v. New York & Harlem R.R. [1905] 197 U.S. 544, 570-571; Hughes v. Washington [1967] 389 U.S. 290, 296-299 [concurring opinion]; Chicago, B.&Q. R. Co. v. Chicago [1897] 166 U.S. 266, 241.)

Two cases quite similar to the case at bench arose recently in Washington and Hawaii. They show the correct rule. Like the California Supreme Court in Gion-Dietz, the Supreme Courts of Washington and Hawaii were concerned with preserving their shoreline areas for "the public". But federal courts have refused to allow this to be done by confiscatory means.

In the Washington case, the Supreme Court of Washington decided for the first time in 1966 that the Washington Constitution of 1889 vested in the State, title to all accretions to the shore. The Constitution did not expressly say that. In Hughes v. Washington (1967) 389 U.S. 290, this Court - on certiorari to the Washington Supreme Court - held that federal law determined ownership of the accretions, and the owner was Mrs. Hughes, not the State. The concurring opinion of Mr. Justice Stewart illuminates the issue at bench:

> "To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law

thus inevitably presents a federal question for the determination of this Court.

* * *

"There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, preexisting property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property - without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment." (389 U.S. at 296-299.)

In Sotomura v. County of Hawaii (D. Hawaii 1975) 402 F.Supp. 95, Mr. and Mrs. Sotomura owned coastal property with a metes and bounds description on the ocean side, rather than a fluctuating tide line boundary. This had been confirmed by the Hawaii Land Court (402 F.Supp. at 99).

Years later, the Hawaii Supreme Court decided to change the rules applicable to coastal boundaries, and established new presumptions relating to coastal boundaries (see 402 F.Supp. at 99, 100).[5/]

Based on its new presumptions, the Hawaii Supreme Court - at the urging of the County of Hawaii - ordered the seaward boundary of the Sotomura property be moved so as to transform part of the Sotomura property into public property.

The Sotomuras then filed suit in U.S. District Court to restrain the enforcement of the State Supreme Court's decision, because of its retroactive destruction of property rights by definitional sleight-of-hand. The District Court found serious constitutional questions:

5/ Just as the California Supreme Court invoked new presumptions in Gion-Dietz.

". . . it is well established that courts are not immune from the constitutional prohibitions against taking property without just compensation when their unpredictable changes of state law operate to produce such a result. [citations] Here, this court has been called upon to determine, inter alia, whether the application of the Ashford standards to plaintiffs' Land Court property constituted an unpredictable or radical departure from established state law." (402 F.Supp. at 101)

The same principles deserve application here. The California Supreme Court's Gion-Dietz decision was (in the words of Hughes and Sotomura), a sudden, unpredictable and radical departure from established law.

One need hardly go beyond the transcripts herein. As the trial judge himself acknowledged:

"THE COURT: Before you leave that, if I can interrupt, instead of rehashing it at some later time, we had for the first time in what? 1971? A rule of law enunciated in this state by the Supreme Court with reference at least to recreational easements, took the whole [legal] profession [by surprise], admittedly, and even the City Attorney prosecuting this case, because up to

that point they were paying valuable money, thought they were doing it because they had to for these very rights." (RT 549)

"Here we are concerned that a Gion recreational easement was established in the public prior to 1922. By the same token, before the Gion decision was announced recently (1970), no one knew it existed." (Notice of Intended Decision, Appendix D, p. 5.)

The practicing bar agrees.

Assistant California Attorney General Jay Shavelson, one of the counsel in Gion-Dietz, called Gion-Dietz ". . . an earthquake of major proportions . . . in California real property law."[6/]

Edward L. Lascher (currently a member of the State Bar's Board of Governors) thought it akin to both a "bombshell" and a "hurricane".[7/]

While student commentators have been somewhat more restrained, they too, echo this thought:

6/ Shavelson, Gion v. City of Santa Cruz: Where Do We Go From Here? (1972) 47 Cal.St.B.J. 415.

7/ Lascher, Tips For the Overburdened Reader (1971) 46 Cal.St.B.J. 13, 16.

". . . an important extension of the law of implied dedication by adverse use . . ."8/

". . . novel use of doctrine . . ."9/

". . . excessively expanded an already muddled variation of the doctrine of implied dedication." 10/

". . . the legal foundation for this decision is equally obscure." 11/

All of the characterizations are true.

Before Gion-Dietz, the basic law with respect to implied dedication of coastal property was clearly stated in the Supreme

---

8/ Note, The Supreme Court of California 1969-1970 (1971) 59 Calif. L. Rev. 30, 231-232.

9/ Note, This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches (1971) 44 S. Cal. L. Rev. 1092, 1093.

10/ Ibid.

11/ Comment, Public or Private Ownership of Beaches: An Alternative to Implied Dedication (1971) 18 U.C.L.A. L. Rev. 795, 802.

Court's decision in F.A. Hihn Co. v. City of Santa Cruz (1915) 170 Cal. 436.12/ In Hihn, the City claimed that property (unused by the fee owner) adjoining public beach property, had been dedicated for public recreational purposes because the public had long used the land as if it were public land, and the owners never objected (170 Cal. at 447).13/ The California Supreme Court curtly rebuffed the notion:

> "Where land is uninclosed and uncultivated, the fact that the public has been in the habit of going upon the land will ordinarily be attributable to a license on the part of the owner, rather than to his intent to dedicate. (13 Cyc. 484). This is more particularly true where the user by the public is not over a definite and specified line, but extends over the entire surface of the tract. (13 Cyc. 484). It will not be presumed from mere failure to object, that the owner of such land so used intends to create in the public a right which would

---

12/ Note that Hihn expressed the law at the time the easements at bench were purportedly acquired.

13/ The facts are remarkably similar to Gion and Dietz.

practically destroy his own right to use any part of the property." (170 Cal. at 448) (Emphasis added.)

Hihn was followed by the California Supreme Court in the later beach cases of City of San Diego v. Hall (1919) 180 Cal. 165, 168; Whiteman v. City of San Diego (1920) 184 Cal. 163, 173; and Manhattan Beach v. Cortelyou (1938) 10 Cal. 2d 653, 668.

Until Gion-Dietz, the implied dedication rule had been applied exclusively to roads. (See Note, This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches [1971] 44 S.Cal. L. Rev. 1092, 1099.)

This rationale of the Hihn line of cases was never judicially questioned until Gion-Dietz (see Shepard's California citations).

What happened in Gion-Dietz - as in Hughes and Sotomura - was a drastic redefinition of property rights. That which was private property was declared by the California Supreme Court - under newly issued rules - to have become public.

The rules which everybody thought were the rules before 1970, are no longer the rules. The means by which an ocean-front property owner reasonably believed he could protect his property rights before 1970, were declared insufficient.

But those settled, pre-1970 rules formed the basis of property law before 1970. Those who relied on what the courts - including the California Supreme Court - had said before 1970, should not be placed in the position of having their property confiscated because they could not predict what the Supreme Court would do. To so so is to deprive them of their property without any legal process - much less due process of law. Retroactive application of Gion-Dietz was erroneous and, until now, monstrously prejudicial at to Mrs. Daugherty.[14/]

14/ Ordinarily, such drastic substantive changes are prospectively applied, in order to prevent the kind of unfair result reached at bench. That the Gion-Dietz decision was itself applied in a retroactive fashion was, as this Court has remarked, necessary in order to provide a justiciable controversy. See, e.g. Stovall v. Denno (1967) 388 U.S. 293, 301: (Cont'd.)

GION-DIETZ, BY RADICALLY AND RETROACTIVELY CHANGING THE LAW OF "IMPLIED DEDICATION", UNCONSTITUTIONALLY IMPAIRED THE OBLIGATION OF CONTRACTS, IN CONFLICT WITH DECISIONS OF THIS COURT

When Mrs. Daugherty acquired her home in 1961, the law of California was clear that there could be no "implied dedication of open beach property simply because the owner failed to take action to evict "public" users.

14/ (Cont'd)
"Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." (Emphasis added.)

Nine years later, in 1970, the California Supreme Court changed all that. In Gion-Dietz, it held that such benign inaction led to a presumption of dedication. That presumption is virtually irrebuttable.15/

In the case at bench, the California courts retroactively applied Gion-Dietz so that random actions of unknown persons half a century before, as well as private inactions at the same time, which would NOT have resulted in an "implied dedication" at the time of their occurrence, had eo instanti transformed Mrs. Daugherty's front yard into a public beach.

Such a radical change in the law, which not only impairs, but destroys, the rights Mrs. Daugherty acquired by her contract of purchase of the property, conflicts with this Court's enforcement of Article 1, §10 of the Constitution.

15/ This case is the proverbial Exhibit A. Once evidence had been introduced of five years of such use, there was nothing Mrs. Daugherty could introduce to change the result. (See the Court of Appeal's decision, Appendix A. p. 5.)

Perhaps the clearest example is Muhlker v. New York & Harlem R.R. (1905) 197 U.S. 544. There, by settled New York law, the plaintiff had an easement appurtenant to his property for light, air and view. An elevated railroad was built which obstructed his easement. The lower New York courts - consistent with settled law - awarded him compensation for the damage inflicted by obstruction of his easement. The New York Court of Appeals reversed. This Court refused to permit such confiscation by a sudden change in the law:

"The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad Cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

"And this is the ground of our decision. We are not called upon to discuss the power, or the limitations

upon the power, of the courts of New york to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad Cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, . . ." (197 U.S. at 570-571.) (Emphasis added.)

The same is true at bench. To redefine rules of property, and then apply them to interests acquired and protected under different rules, is unfair. As in Muhlker, such retroactive application unconstitutionally impairs the obligations of contract.

CONCLUSION

At the conclusion of the difficult proceedings below, the trial judge, as he was about to declare the Daughtery yard, home and bedroom subject to a public

recreation easement, said to Mrs. Daugherty's attorney:

> "THE COURT: I will go along with you. I happen to believe in property rights. I happen to believe in the capitalist system. I am not a Communist, but when rights are taken away from property owners who don't know that they are giving up rights in the course of time, what am I to say? I have no alternative."

Mrs. Daugherty believes that the trial court had an "alternative", one obediant to the United States Constitution. She prays that a writ of certiorari issue, and that the judgment be reversed, so that the primacy of the United States Constitution is preserved.

Respectfully submitted,

JERROLD A. FADEM
MICHAEL M. BERGER
FADEM, BERGER & NORTON
A Professional Corporation

Attorneys for Petitioner

APPENDIX A

[Civ. No. 48399 Second Dist. Div. Four Dec. 16, 1977]

CITY OF LONG BEACH, Plaintiff and Respondent, v. CATHERINE A. DAUGHERTY et al., Defendants and Appellants; STATE OF CALIFORNIA, Defendant and Respondent.

OPINION

KINGSLEY, J. — Defendants Daugherty and Sheehan appeal from a judgment declaring that there exists a public easement for recreational purposes over certain property owned by them. With a modification requested by the city and state, we affirm the judgment.

Defendants own property, in the City of Long Beach, located on the ocean beach of that city. Originally, the state's answer sought to determine the boundary between the city-owned submerged tideland and the property of the defendants. During the course of the trial, the parties entered into agreements fixing the seaward boundary of their properties at what is commonly known as the

"Chapter 138 line."[1/] The trial court found that the entire property of the defendants' shoreward of that line, including improved portions thereof, to be subject to an easement in favor of the public. At the motion for new trial and here the city and state waived and abandoned any claim to an easement over the improved portions of the property. In accordance with that present position, we modify the judgment as hereinafter provided.

The properties herein involved are located on a sandy beach in the City of Long Beach, lying between Ocean Boulevard and the Pacific Ocean. In the past, the shoreline was eroded and half or more of the properties were covered by water. In 1954, the city began to make sand

---

1/ As recited in the judgment, the "Chapter 138 line, refers to that certain line described in section 7 of Chapter 138, Statutes of 1964, 1st Extraordinary Session, a survey map which was recorded March 11, 1968, as Document No. 1498 in Book M-2796, Page 449, Official Records in the office of the County Recorder of Los Angeles County and filed therein as No. F-1267."

fills to alleviate the erosion and the city spent more than $2 million to stabilize the beach. Sandfill was placed on the seaward 38 feet for the Sheehan lot and the seaward 64 feet of the Daugherty property.

The court found the public had made continuous use of the properties for 60 years. The public used the beach for hunting, fishing, swimming, shell collecting, ball playing, picnicking, without asking permission from the owners. The public used the "entire" beach as if it were a public beach. Captain Miller, a lifeguard from 1922 to 1966, was asked whether the public used "the areas in front of the houses on the beach," and he responded, "All of the time." He said, "Regardless of where the house was, they laid in front of the house, spread their blankets out and that was their place."

The city put up a restroom in the vicinity of the beach, there were lifeguard services, and between 250 to 350

people a day used the beach[2/] during the period between 1924 and 1935. Beginning in 1924, the city maintained the beach by cleaning and grading, including maintaining the area in front of the houses, and between the houses, and the owners were aware of the city's maintenance.

The subject properties are between Granada Avenue on the west and 55th place on the east. The city caused a series of sandfills on the subject property from 1945 to 1960. These sandfills widened the beach so that it extended approximately 500 feet southerly or seaward of the Chapter 138 line. On the Sheehan parcel, the fill extended northerly to within 95 feet of Ocean Boulevard and on the Daugherty parcel, the fill extended northerly to cover the seaward 64 feet of the property. The fill was paid for by public funds and later out of tideland trust revenue. Part of the Sheehan property and Daugherty property is improved.

2/ The record on this point appears to refer to the entire beach and not the defendants' property alone.

Appellants' photographs showed no one on the beach near the subject properties on beach-type holidays such as Labor Day and the Fourth of July. (Some homes had signs which said, "Private Property - Permission to Pass Revocable at any Time.") However, there is no citation in the long record as to which homes had the signs and at what dates the signs were up.

The trial court found the recreational easements were dedicated before 1922 and the trial court concluded the Mansell case (City of Long Beach v. Mansell (1970) 3 Cal.3d 462 [91 Cal.Rptr. 23, 476 P.2d 423]) established only fee title and boundaries and did not preclude the finding of a public recreational easement. The lower court relied on Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29 [84 Cal.Rptr. 162, 465 P.2d 50], which held that use by the public for the prescriptive period without asking or receiving permission from the fee owner resulted in implied dedication of a recreational easement to the public.

I

One of the issues in the case at bench, as stated by appellants, is whether the subject beachfront properties were impliedly dedicated to public use under Gion v. City of Santa Cruz, supra, 2 Cal.3d 29, or whether that implied dedication was precluded by the decision in City of Long Beach v. Mansell, supra, 3 Cal.3d 462, which fixed the boundaries of specific properties in the case at bench.

Appellants' first argument is that the judgment below undermined the Mansell decision which had settled the boundaries of the land in question and also had settled matters of title in the land. As a reading of the opinion in that case discloses, Mansell was a proceeding to validate an agreement, entered into between the city and various property owners, seeking to settle long-standing and complicated disputes over the tidelands in Alamitos Bay. The agreements involved purported to settle the boundary line between the tidelands that were the property of the city as

transferee from the state and the upland areas, adjoining those tidelands, which were thereby recognized as the private property of the upland owners. The lands herein involved were among those involved in those agreements and in that decision. Nothing in the agreements or the decision is directed to the existence of any easements over any of the land therein involved. Nor was there any need, in view of the purpose of the agreements involved, to consider any issue as to easements. Ownership of an easement has no necessary relationship to ownership of a fee title. An easement is defined as an interest in the land of another which entitled the owner of the easement to a limited use or enjoyment of the servient tenement. (See Eastman v. Piper (1924) 68 Cal.App. 554 [229 P. 1002].) Nothing in the agreements involved in Mansell, or in that decision, relates to or affects the existence of a recreational easement in the lands therein involved.[3/]

3/ The quitclaim deeds involved in Mansell, and the deeds given to effect that decision expressly involve only

(continued)

II

Appellants argue that the case at bar is distinguishable from Gion v. City of Santa Cruz, supra, and Dietz v. King (1970) 2 Cal.3d 29 [84 Cal.Rptr. 162, 465 P.2d 50], in both matters of policy and on its facts. Appellants also point to legal articles suggesting that the decision of Gion and Dietz should not be expanded beyond their facts and should not be applied to the facts at bar.

First, appellants point out that there are means of access to the public beach in question other than access by going over the subject properties, whereas in Gion and Dietz, which were bounded by the high tideline, there were no means of access beyond the public tidelands. However, it does not appear from Gion-Dietz that the public is entitled to a recreational easement only in situations where that easement is the only means of access. Gion-Dietz is not so limited.

3/ (continued)
"sovereign" rights: they are expressly limited to such rights and do not apply to claims of easement in the public.

The Supreme Court in the Gion-Dietz cases considered matters of governmental maintenance of the land and public use of the land and not merely the question of whether there were other means of access to the beach.

Appellants argue that there were no structures maintained by the owners on the disputed property in Gion or in Dietz, whereas appellants have structures on their land. Since, because of the abandonment above discussed, the particular portions of the Sheehan and Daugherty properties that are now the subject of this appeal are not improved, this argument does not aid appellants' position.

Because the case at bench, in light of the modification sought by the city and state, does not involve any claim to property over which a public easement may have existed in the past but which, without opposition by any public body, has later been improved or fenced, we need not, and do not, consider the effect of such a succession of events on a present claim to an easement.

Appellants argue that, in Gion, the property owners did not object to public use, and the appellants in the case at bar claim they did ask people to leave. There is no showing that appellants' predecessors in title asked people to leave, and, although the testimony is conflicting, there is a great deal of evidence to show that people were not asked to leave, and that no significant efforts were made to get the public to leave. Mrs. Sheehan merely asked people to leave when they were "rowdy" and Mrs. Daugherty said no one was ever on her land. "If the owner has not attempted to halt public use in a significant way, however, it will be held as a matter of law that he intended to dedicate the property or an easement to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication." (Gion v. City of Santa Cruz, supra, 2 Cal.3d 29, 41.)

Appellants argue that in Gion-Dietz the use by the public was current but in the case at bar, the usage was not current.

There is some testimony in the case at bar to the effect that the public usage was current and there was some testimony concerning current cleaning and maintenance by the city.

Appellants argue that, in Gion-Dietz, the public rightly believed that the property was public, but that the public could not have held such a belief in the case at bar, because the parcels in question were improved with houses. That is a misreading of the opinion in those cases. Their holding is that it is the intention of the property owner that controls and, as stated in the quotation above given from Gion, the existence of an intention to dedicate may be inferred, as a matter of law, from long acquiescence.

Appellants argue that the court will not presume that owners of the property today knowingly permit the general public to use their land. However, the court has not made such a presumption. It was only after the taking of evidence that the court found a recreational easement, and that finding was based on public use

of the beach, and maintenance of the beach by governmental entities.

Appellants argue that a Gion-Dietz easement is not created unless members of the public used the property believing that the public had a right to use it asserting that a finding on belief is essential. (Gion v. City of Santa Cruz, supra, 2 Cal.3d 29, 39.) In Gion, the court said that what must be shown is that "[the] persons used the property believing the public had a right to such use." However, the Gion court also said: "Litigants . . . seeking to show that land has been dedicated to the public need only produce evidence showing that persons have used the land as they would have used public land." There is nothing in the language of Gion to suggest that a specific finding on a public's "rightful belief" is essential.

III

Appellants argue that the court findings were not supported by substantial evidence. Appellants argue that there was insufficient evidence to show

substantial use by diverse members of the general public using the property for at least five years. We do not agree. Captain Miller, the lifeguard captain who was in charge of the beach from 1922 to 1966, testified that, from 1924, the public used the whole beach for recreational purposes including the area in front of the houses.

People who used the beach did not ask permission from the homeowners and the property owners rarely objected to the use although they were aware of the public's use. The lifeguards raked the whole length of the beach, including the area up to and in front of and between the houses, and the property owners were aware that the city was cleaning the beach. Several residents of the area also testified to public use of the beach immediately in front of the houses; and that the use was without permission from the homeowners and without objection. A resident of the area also testified to public use of the beach between the houses in order to get to the water. Public employees testified that they

cleaned the beach going as close as one or two feet of any house. Photographs of the sand in front of the property show heavy use indicated by many foot-prints in the sand.

Thus, there is substantial evidence to show public maintenance of the beach and public use of the beach since and before 1924, continuing on for many years beyond the necessary period.

Appellants rely on County of Orange v. Chandler-Sherman Corp. (1976) 54 Cal.App. 3d 561, 566 [126 Cal.Rptr. 765], to show that use must be substantial rather than casual usage for the court to find a recreational easement. That case is not here applicable since the evidence and the findings show much more than casual usage by small numbers of the public.

Appellants complain that evidence on public use of the beach in the case at bar was not specifically directed to use of the beach in front of the particular subject parcels. It is true that some of the city's evidence applied to the beach as a whole rather than to the specific area in question. However, the trial

court could properly infer from that testimony, which referred to the beach as a whole, that the evidence related to and included the subject properties. In addition to the testimony about the beach as a whole, there was specific testimony concerning use of the beach by the public in front of appellants' houses and between the houses.

IV

Appellants argue that it is unfair to apply Gion "retroactively." Appellants appear to argue that it is unfair to apply Gion to facts that existed prior to the Gion decision. But, in Gion itself, the facts existed prior to any decision finding an implied dediction in the particular situation that existed before that court. Therefore, the argument is without merit.

The judgment in superior court case No. SO-C-23517 (Sheehan) is modified as follows:

Delete in their entirety paragraphs 1 and 2 of said judgment and substitute therefor the following language:

"1. That at the time of the commencement of this action, title to an easement for recreational purposes in, over, upon and across a portion only of the subject parcel of real property, all as more particularly hereinafter in this paragraph described, was and now is vested in the City of Long Beach, a municipal corporation, as owner in fee of said easement, for itself and on behalf of the public generally. Said easement is described as follows:

"An easement in, over, upon and across the parcel of real property hereinafter described for public recreation purposes, and public uses incidental thereto, including but not limited to parking, picnicking, sunbathing, swimming, surfing, strolling, fishing, boating, playing sports, general viewing, access to the beach and the Pacific Ocean, public protection and policing and maintenance, to wit:

"The westerly 25 feet of Lot 7 in Block 44 of the Resubdivision of Part of Alamitos Bay Townsite, in the City of Long Beach, County of Los Angeles, State

of California, as per map recorded in Book 4 pages 75 and 76 of Maps in the office of the County Recorder of said County. Said parcel shall be deemed to be bounded on its southerly or seaward side by the Chapter 138 Line*, on its westerly side by the westerly line of said Lot 7 and its prolongation southerly to the Chapter 138 Line and on its easterly side by the easterly line of said westerly 25 feet of Lot 7 and its prolongation southerly to the Chapter 138 Line.

"EXCEPT that portion of the westerly 25 feet of Lot 7 lying northerly of a line parallel to and located southerly 123.50 feet, measured at right angles, from the southerly line of Ocean Boulevard, a public street, which public street abuts said lot on its northerly side.

"*As used herein the Chapter 138 Line refers to that certain line described in Section 7 of Chapter 138, California Statutes of 1964, 1st Extraordinary Session, Survey Map of which was recorded March 11, 1968 as Document No. 1498 in Book M-2796 Page 449. Official Records, in the office of the County Recorder of said Los Angeles County and filed therein as No. F-2167.

"Title to the northerly 123.50 feet referred to in the exception to the description set forth immediately hereinabove was not and is not now subject to or encumbered by any easement for public recreational purposes in, over, upon and across all or any portion thereof.

"2. That the defendant Genevieve Sheehan, as owner of the underlying fee title in and to the subject parcel of real property, has no estate, right, title, lien or interest whatsoever in or to said easement, or in any part thereof, and said defendant has no right to build, use, occupy or maintain any permanent structures, buildings or improvements on or over said easement area, or any part thereof, or otherwise make any use of said westerly 25 feet of Lot 7 or any part thereof which would in any way unreasonably interfere with the above described rights of plaintiff and the public under said easement."

The judgment in superior court case No. SO-C-23518 (Daugherty) is modified as follows:

Delete in their entirety paragraphs 1 and 2 of said judgment and substitute therefor the following language:

"1. That at the time of the commencement of this action, title to an easement for recreational purposes in, over, upon and across a portion only of the subject parcel of real property, all as more particularly hereinafter in this paragraph described, was and now is vested in the City of Long Beach, a municipal corporation, as owner in fee of said easement, for itself and on behalf of the public generally. Said easement is described as follows:

"An easement in, over, upon and across the parcel of real property hereinafter described for public recreation purposes, and public uses incidental thereto, including but not limited to parking, picnicking, sunbathing, swimming, surfing, strolling, fishing, boating, playing sports, general viewing, access to the beach and the Pacific Ocean, public protection and policing and maintenance, to wit:

"Lot 3 in Block 51 of Resubdivision of Part of Alamitos Bay Townsite, in the City of Long Beach, County of Los Angeles, State of California, as per map recorded in Book 4 pages 75 and 76 of Maps, in the office of the County Recorder of said County. Said parcel shall be deemed to be bounded on its southerly or seaward side by the Chapter 138 Line*, on its westerly side by the westerly line of said Lot 3 and its prolongation southerly to the Chapter 138 Line and on its easterly side by the easterly line of said Lot 3 and its prolongation southerly to the Chapter 138 Line.

"EXCEPT that portion of Lot 3 lying northerly of a line parallel to and located southerly 95 feet, measured at right angels, from the southerly line of Ocean Boulevard, a public street, which public street abuts said lot on its northerly side.

"*As used herein the Chpater 138 Line refers to that certain line described in Section 7 of Chapter 138, California Statutes of 1964, 1st Extraordinary Session, Survey Map of which was recorded March 11, 1968 as Document No. 1498 in Book M-2796 Page 449. Official Records, in the office of the County Recorder of said Los Angeles County and filed therein as No. F-2167.

"Title to the northerly 95 feet referred to in the exception to the description set forth immediately hereinabove was not and is not now subject to or encumbered by any easement for public recreational purposes in, over, upon and across all or any portion thereof.

"2. That the defendant Catherine A. Daugherty, as the owner of the underlying fee title in and to the subject parcel or real property, has no estate, right, title, lien or interest whatsoever in or to said easement, or in any part thereof, and said defendant has no right to build, use, occupy or maintain any permanent structures, buildings or improvements on or over said easement area, or any part thereof, or otherwise make any use of said Lot 3 or any part thereof which would in any way unreasonably interfere with the above described rights of plaintiff and the public under said easement."

As so modified, the judgments are affirmed. The city shall recover its costs on appeal.

Files, P.J., and Jefferson (Bernard), J., concurred.

APPENDIX B

Los Angeles, Cal. JAN 3- 1978

TITLE (City of Long Beach) / (Daugherty, et al) No. 48399

The Court:

PETITION FOR REHEARING DENIED.

Clay Robbins, Clerk

APPENDIX C

CLERK'S OFFICE, SUPREME COURT

4250 State Building
San Francisco, California 94102

FEB 9 1978

I have this day filed Order _____

HEARING DENIED

In re: 2 Civ. No. 48399

City of Long Beach

vs.

Daugherty

Respectfully,

G.E. BISHEL
Clerk

C-1.

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CITY OF LONG BEACH,

Plaintiff,

vs.

MULLINEX, et al.,

Defendants.

No. So C 23513

NOTICE OF INTENDED DECISION

The following memorandum may be deemed a notice of intended decision and will serve in its own way as a guide for the preparation of findings of fact and conclusions of law. (The manifest disjointedness of the comments contained hereinafter is dictated by the necessity for avoiding a more prolix statement and, in a measure, constitute the Court's reactions to the various arguments as they appear in the memoranda submitted to the Court by respective counsel."

It is urged upon the Court that there has been no showing of five years of use immediately prior to the filing of suit which would justify the granting of any easement in this matter. If this legal

proposition were valid, manifestly, the plaintiff must go hence with nothing. Each of these parcels, at least to the extent of the perimeters of their structures, plus enclosures, have not been so used by the public for recreational purposes during any part of the five years prior to suit. However, the argument or contention that the crucial period is that five-year period immeidately prior to suit has no merit. It would be countervailing to what was said in Gion, ("nothing can be done by the present owners to take back that which was previously given away"), and it has been held elsewhere that even laches by the governmental entity cannot rob the public for which it acts as a trustee, of the benefit of the easement; nor is it necessary to establish or recognize at least one of the easements sought to be established here, that is, the recreational easement, that the City must show it did anything at all by way of protecting the properties or in administering them in furtherance of the recreational easement. Conversely, when that is

shown to be present, it supplies additional evidence that the easement was existent and recognized.

Gion did not turn on the volume or nature of services performed on the land by the City, although consideration was there given to that factor--the thrust of the decision springs from the public user for recreational purposes.

Reference has been made to the self-help of the landowners to protect their homes and to restore them after storms, and this likewise does not militate against the existence of the easement according to the previously mentioned quotation from Gion.

To separate and distinguish the subject properties from the entire 8-1/2 miles of beach shoreline is unnecessary. The use of all 8-1/2 miles, these parcels included, for recreational purposes impresses the easement on all 8-1/2 miles, these parcels included. The more popular use of the westerly shoreline, as against the easterly area and beaches which include the parcels at bench, does not

dissipate the recreational character and use of these parcels now in litigation. The testimony received indicates sporatic use, seasonal from the very nature of the type of easement, to-wit, picnicing, bathing, clamming, etc., and no limitation as to persons to whom the beach was available for these purposes when the occasion and season called for it. True, there has been evidence of more substantial use in other portions, but no criterion has been set up by the Gion case as to volume of use.

The focus of our consideration must be, according to Gion, whether these parcels in fact were used--more or less--for such purposes for the requisite period of time. In effect, Gion is saying that the used beaches belong to the people for recreational purposes. (By "used," we refer, of course, to the five year limitation necessary for creation thereof.)

The City's "recognition" of "rights of individual owners" by placing its installations on city-owned property or beyond the Chapter 138 line (failing to

place even one trash can on the property of the defendants), does not destroy the easement it now seeks to have judicially impressed on those properties. The City is a trustee for the public recreational-easement users, as well as a governmental body performing specific functions which can be carried out with a minimal imposition on property owners and without abandoning the trust of the easement or the substantive rights of the "public". Gion suggests that once recreational easement has been established, neither the property owners nor the public entity involved--city, county or town--can do anything to destroy it or abandon it--nor does diminishing use, as distinguished from increasing use, have such effect.

Here we are concerned that a Gion recreational easement was established in the public prior to 1922. By the same token, before the Gion decision was announced recently (1970), no one knew it existed. Can we then point to any conduct prior to that decision, viz., building permits, zoning, city installations beyond the parcel boundaries, etc.,

as affecting an abandonment? Implicit in the concept of abandonment is an intelligible choice of conduct, that is, conduct with some knowledge of the underlying rights. If this is true, how can we say the City (assuming it was so empowered to do) must be deemed to have "abandoned" easements it didn't even know existed? Even cities can't be chargeable with such prescience.

By the same token, Gion answers a contention made by defendants herein that non-use of the easement for the prescriptive period by reason of the erection of homes on the servient land extinguish the easement, for Gion states the acts of the servient tenement owner cannot destroy or extinguish the public recreational easement. McCormick is not apropo, for there the court was dealing with individually owned easements and not a public recreational easement as in Gion. In any event, Gion having emanated from the Supreme Court has overriding authority, being a later and higher source to which every knee must bend.

Mansell dealt with legal titles of the parcels herein involved, among others, but defendants fail to distinguish that the present focus of the City's litigation is limited to easements and does not extend to the legal title of the underlying servient tenements, nor is any claim now made thereto--so estoppel, under Mansell and the execution of the agreements under the authority of the enabling act and the force of that opinion, is not available to resist plaintiff's claim. Estoppel involves a change of position or reliance on conduct, etc., which would otherwise work an injustice. While there may be an underlying "injustice to the landowners", it does not spring from the sources noted. The clarification and settlement of boundary and title questions could not militate against the present assertion of this public easement.

In the narrow context of this case the affirmative defenses of laches, adverse possession and statutes of limitation cannot be applied against the "public-use". Estoppel is not to be

applied, for plainly, and only lately, long after acts of the City relied on as a basis for estoppel occurred, did we even learn of the judicial birth of this public-use easement, after an unduly long and substantially unknown and uneventful pregnancy. One of the elements and possibly the most significant of estoppel is an "awareness" by the party to be estopped in the true facts and this City, no more than Santa Cruz before Gion in 1970, was not aware or apprised of the existence of the easement which was then suddenly born full-grown.

The contention made by defendants that defendants had no right to grant or deny permission to the public to use the tidelands and that plaintiff has not proved otherwise begs the question completely. The thrust of Gion is in reverse, that is, that public users thereof somehow extracted from defendants ownership and carved out a public-users easement, not only of former tidelands, but of the uplands so used as well.

Insofar as "dedication" is based on a voluntary act, as defendants contend,

it is irrelevant to Gion's imposition of the easement, willy-nilly the landowner. These arguments would be better made (and undoubtedly were made without success) to the Gion court and not to this tribunal, which is compelled to follow Gion by the mandate of office--even if it were to agree with the propriety of the contention here made.

Insofar as the erection of houses may constitute an expression of intent negativing dedication by defendants, there are al least two answers there too, viz., such erection took place after the period fixed for creation of the public easement and the property owner having once dedicated cannot "withdraw" such dedication.

The posting of signs here did not occur until after that public use had ripened into an easement.

The City of Long Beach, as a governmental entity, cannot surrender, by quitclaim deed or otherwise, the recreational easement here existent. It's possessory rights are not all-inclusive of the public's rights, as we read Gion, nor is the City's alleged motivation in

this law suit, as suggested by defendants, a consideration for denying the application to have the easement judicially declared. If the easement existed, it continues--regardless of such motivation (as to which no finding is here made for that reason).

To label the land anything other than beach land is to really bury one's head in the sands thereof. The only change is not one of character, but of size.

The evidence of erosion control in this record indicates the public entities individually or jointly, cooperatively engaged in such activity over various periods of time at public expense, all in preservation and furtherance of the public recreational easement. We suspect that defendants' argument that the court should reject the claimed erosion control easement would be prejudicial even to defendants' ownership interest saddled with or free of the claimed recreational easement. Be that as it may, it has not been adequately shown that any of the uplands here involved for any required period of time, to-wit, five years, have been

subjected to erosion control measures sufficient to create an easement on such uplands (by uplands herein we refer, of course, to the parcels north of the 138 line). There hasn't been demonstrated by a preponderance of evidence that any of such erosion control measures were in fact carried on in any part of the uplands. For that reason, the claim to an erosion control easement must be rejected. Parenthetically, there is credible testimony to the effect, in any event, that it's hardly deemed necessary to have such easement when we consider the present size of the beach area south of the 138 line, and the facility with which the plaintiff can operate for appropriate erosion control activity in that area south of such line.

The evidence herein is insufficient to support a finding that any defendant (or predecessor in title) granted a license to the public to use his property or that any defendant made a bona fide attempt to prevent public use before the easement was ripened into existence by the passage of five years. The signs

pictured in evidence are witnesses to the contrary for at least a period subsequent to the birth of the recreational easement.

As Gion states, the law is that the landowner "intended" dedication to public use and the record does support this finding of such use for the prescriptive period herein. True, this evidence from the nature of the case and the antiquity of the events, is not overwhelming, but is of sufficient substantiality to impress an impartial tribunal.

Counsel for the City should prepare, serve and file with the Clerk of this Department findings, conclusions and prepare judgment in accordance with the foregoing.

DATED: 8/1, 1974.

MAX Z. WISOT
JUDGE OF THE SUPERIOR COURT

APPENDIX E

LEONARD PUTNAM, City Attorney
CLEMONS C. TURNER, Deputy City Attorney

Attorneys for Plaintiff

Suite 600 City Hall
Long Beach, California 90802

Telephone: 436-9041

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CITY OF LONG BEACH, a municipal corporation,	)	No. SOC 23518
Plaintiff,	)	JUDGMENT QUIETING TITLE TO REAL PROPERTY
vs.	)	
CATHERINE A. DAUGHERTY, et al.,	)	
Defendants.	)	

Upon the findings of fact and conclusions of law on file herein, and good cause appearing therefor, it is ORDERED, ADJUDGED AND DECREED:

1. That at the time of the commencement of this action, title to an easement for recreational purposes in, over, upon and across the subject parcel of real property, all as more particularly

hereinafter in this paragraph described, was and now is vested in the City of Long Beach, a municipal corporation, as owner in fee of said easement, for itself and on behalf of the public generally. Said easement is described as follows:

> An easement in, over, upon and across the parcel of real property hereinafter described for public recreation purposes, and public uses incidental thereto, including but not limited to parking, picnicking, sunbathing, swimming, surfing, strolling, fishing, boating, playing sports, general viewing, access to the beach and the Pacific Ocean, public protection and policing and maintenance, to wit:
>
> Lot 3 in Block 51 of Resubdivision of Part of Alamitos Bay Townsite, in the City of Long Beach, County of Los Angeles, State of California, as per map recorded in Book 4 pages 75 and 76 of Maps, in the office of the

> County Recorder of said County, Said parcel shall be deemed to be bounded on its southerly or seaward side by the Chapter 138 Line*, on its westerly side by the westerly line of said Lot 3 and its prolongation southerly to the Chapter 138 Line and on its easterly side by the easterly line of said Lot 3 and its prolongation southerly to the Chapter 138 Line.

2. That the defendant Catherine A. Daugherty, as the owner of the underlying fee title in and to the subject parcel of real property, has no estate, right, title, lien or interest whatsoever in or to said easement, or in any part thereof,

---

* As used herein the Chapter 138 Line refers to that certain line described in Section 7 of Chapter 138, California Statutes of 1964, 1st Extraordinary Session, Survey Map of which was recorded March 11, 1968 as Document No. 1498 in Book M-2796 Page 449, Official Records, in the office of the County Recorder of said Los Angeles County and filed therein as No. F-2167.

and said defendant has no right to build, use, occupy or maintain any permanent structure, buildings or improvements on said subject real property, or any part thereof, or otherwise make any use of said property or any part thereof which would in any way unreasonably interfere with the above described rights of plaintiff and the public under said easement.

3. That said title of the plaintiff, City of Long Beach, in and to the public recreation easement as more particularly described hereinabove in paragraph 1 be and the same is hereby forever quieted against any and all claims of the defendant Catherine A. Daugherty and said defendant is perpetually enjoined and restrained from setting up or making any claim to or upon the public recreation easement above referred to and described.

4. That at the time of the commencement of this action, title to certain tide and submerged lands as more particularly hereinafter in this paragraph described was and now is vested in the City of Long Beach, a municipal corporation,

as owner in fee simple absolute, as trustee, under and by virtue of the provisions of Chapter 676, Statutes of 1911; Chapter 102, Statutes of 1925; and Chapter 158, Statutes of 1935, all as amended and supplemented. Said real property is described as follows:

> All that real property adjacent to and lying southerly or seaward of the subject parcel of real property as described in paragraph 1 hereinabove.

5. That except as a member of the public generally, the defendant Catherine A. Daugherty has no estate, right, title, lien or interest whatsoever in or to said tide and submerged lands, or in or to any part thereof.

6. That said title of plaintiff, City of Long Beach, as trustee, in and to the tide and submerged lands as more particularly described hereinabove in paragraph 4, and each and every part thereof, be and the same is hereby forever quieted against any and all claims of the defendant Catherine A. Daugherty and said defendant is perpetually

enjoined and restrained from setting up or making any claim to or upon said tide and submerged lands, or any part thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

7. That plaintiff shall recover from the defendant Catherine A. Daugherty its costs and disbursements as herein incurred in the amount of $_____; provided, however, that no costs shall be recovered against the defendant State of California.

DATED: 1/13/75

/s/ Max Z. Wisot
JUDGE OF THE SUPERIOR COURT